

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANDY ARRIOLA

Claimant

VS.

BMS CONTRACT SERVICES, LTD.

Respondent

AND

XL SPECIALTY INS. CO.

Insurance Carrier

Docket No. 1,040,563

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 29, 2012, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on September 21, 2012. The Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of former Board Member David A. Shufelt. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Andrew L. Speicher, of Leawood, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant had a 12 percent permanent partial impairment to his right upper extremity at the level of the forearm.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asks the Board to modify the Award and find that he suffered injuries to his neck as well as injuries to his right upper extremity, and therefore is entitled to an award for impairment to the body as a whole and a work disability.

Respondent argues that claimant should be limited to a scheduled injury to his right upper extremity and, therefore, is not eligible for a work disability. In the event the Board finds claimant suffered an impairment to the whole body, respondent contends claimant is still not entitled to a work disability because he had worked postinjury for higher wages than he had received at respondent; because after leaving his postinjury employment, claimant failed to make a good faith effort to find reemployment; and because claimant is an illegal alien and therefore cannot establish a postinjury wage loss.

The issues for the Board's review are:

(1) Is claimant limited to an impairment for a scheduled injury or did the evidence prove he suffered impairment to the body as a whole?

(2) If claimant suffered impairment to the body as a whole, is he entitled to a work disability?

FINDINGS OF FACT

Claimant was 24 years old at the time of his accident on February 26, 2008. He had entered the United States illegally in 2003. He said he had a permanent resident card, but it was false. He said that between 2003, when he first came to the United States, and 2007, when he started working for respondent, he performed day labor picking up trash and leaves. Sometimes he would perform gardening work. He was paid in cash.

In 2007, claimant began working for respondent as a cleaner. Respondent sent claimant to Dold Foods, a meat processing plant, where claimant was instructed to clean machinery. Claimant said the job at times entailed heavy lifting. On February 26, 2008, as he was cleaning a part he thought weighed about 130 to 140 pounds, claimant lifted the part and immediately felt as though something inside him tore or broke. Claimant felt the sensation from the right side of his neck under the base of his skull to the back of his right shoulder. Claimant said he felt the neck pain immediately, and then it seemed to concentrate in the back of his right shoulder.

Claimant said he immediately reported his injury to his supervisor, and his supervisor said he would send him to a doctor. However, days went by and nothing was done. Claimant said he daily reminded his supervisor that he was in need of treatment. He said respondent eventually sent him to three different doctors, whose names he could not remember. He said none of the doctors found anything wrong with him, although one of the doctors sent him for an MRI and one doctor gave him an injection in his shoulder. Claimant was given restrictions by one of the doctors. Claimant was also sent to physical therapy by one of the doctors, but he admitted he missed some of his physical therapy treatments, saying he had no car and at times had trouble getting rides.

Claimant was finally referred to Dr. Pat Do. Dr. Do gave claimant an injection in his right shoulder and sent him to physical therapy. When claimant continued to have pain, Dr. Do performed right shoulder arthroscopy with debridement of the glenohumeral joint, including the labrum and synovium, and a right shoulder arthroscopy subacromial decompression, on June 29, 2009. Claimant was sent to physical therapy after the surgery, and Dr. Do released him from treatment with no restrictions in October 2009.

Claimant was terminated by respondent in May 2008. Claimant said he had been fired because he would tell his supervisor the job was hard for him and he needed to see a doctor. His supervisor, Telesforo Avila, testified that claimant had been suspended on May 2, 2008, for insubordination and was told to report to work the next Monday. Mr. Avila said claimant did not appear at work on that next Monday, and three days later he was terminated. Claimant testified that respondent purposely made him work outside his restrictions, but Mr. Avila said that claimant had been reprimanded a couple of times for working outside his restrictions.

Claimant complains he still has pain in his right shoulder and has swelling at the site of his surgery. He has pain in his back. His right arm is weak and he has trouble lifting anything heavy with his right arm. As of the date of the regular hearing on May 18, 2011, claimant was not working. For about eight days in January 2009, claimant worked for Globe Plastics packing small parts into boxes. Claimant said he had to quit that job because of pain in his right arm. Claimant said he had not worked at any other job since being terminated by respondent.

Dr. Pedro Murati is board certified in physical medicine, electrodiagnosis, and independent medical evaluations. He saw claimant on two occasions, both at the request of claimant's attorney. He first saw claimant on August 12, 2008. At that time, claimant complained of pain in his right shoulder and neck, popping of the right shoulder, and weakness of the right shoulder. Claimant told Dr. Murati that he was currently working as a painter for Denny Forche and had been at that job about a month.¹ Dr. Murati stated that claimant's position as a painter could have affected the pain in his right shoulder because painters usually do above-shoulder work. Dr. Murati did not ask claimant any questions about his job as a painter, but he did not think that one month of work as a painter would significantly have made claimant's condition worse.

Claimant gave a history of injury on February 26, 2008, when he was lifting something very heavy and felt something come apart in his right shoulder. Dr. Murati indicated claimant's medical records showed claimant was sent by respondent to Dr. Dobyns, who diagnosed him with a shoulder sprain. An MRI was done, which was read as normal. Claimant was referred to physical therapy, which he said did not help but made

¹ This is contrary to claimant's testimony that his only job after his termination from respondent was at Globe Plastics.

the pain worse. Dr. Dobyns gave claimant an injection on May 8, 2008. Claimant said he had not received any treatment since then.

In August 2008, claimant's bilateral upper extremity reflexes were normal, so Dr. Murati said claimant did not have radiculopathy. Claimant's muscle strength testing was normal. He did not have carpal tunnel syndrome. Claimant had negative rotator cuff examinations bilaterally. Claimant's neck examination showed no signs of radiculopathy. Dr. Murati diagnosed him with right shoulder rotator cuff tear with impingement syndrome and myofascial pain syndrome affecting the right shoulder, neck and upper back. Dr. Murati attributed these conditions to claimant's accident of February 26, 2008. The only restrictions Dr. Murati issued at that time were that claimant work as tolerated and use common sense.

Claimant saw Dr. Murati again on July 22, 2010. At that time, claimant's chief complaints were discomfort in the neck and chronic pain in the shoulder with right arm weakness. Claimant had been treated by Dr. Do and underwent a right shoulder arthroscopy with debridement and a right shoulder arthroscopic subacromial decompression on June 29, 2009. Claimant was released by Dr. Do with no restrictions, but claimant went back to see Dr. Do a month after his release for a shot in his right shoulder.

Upon examining claimant on July 22, 2010, Dr. Murati said claimant had a common complication of shoulder surgery—diminished sensation along the right shoulder patch area. Dr. Murati opined that claimant continued to have myofascial pain syndrome affecting the right shoulder girdle extending to the neck and thoracic spine. Dr. Murati placed restrictions on claimant of no ladders, crawling, or heavy grasp with the right, no above level work with the right, and no reaching more than 24 inches from the body on the right. Dr. Murati further recommended that claimant not lift, carry, push, or pull greater than 35 pounds and that only occasionally, 20 pounds frequently. Claimant should avoid awkward positions of the neck and avoid twisting the trunk.

Based on the *AMA Guides*,² Dr. Murati rated claimant's as follows: For the subacromial decompression, 10 percent to the right upper extremity; for the loss of range of motion, 8 percent to the right upper extremity, which would combine with the 10 percent for a 17 percent impairment to the right upper extremity, and then would convert to 10 percent to the whole person. For myofascial pain syndrome in the neck, Dr. Murati placed claimant in Cervicothoracic DRE Category II for 5 percent to the whole body. For myofascial pain syndrome affecting the thoracic paraspinals, he placed claimant in Thoracolumbar DRE Category II for 5 percent whole person impairment. The whole person impairments combined for a total 19 percent whole person impairment.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Mark Melhorn, who is board certified in general orthopedics with an added certification in hand and upper extremities, examined claimant on April 8, 2010, at the request of the ALJ. Claimant complained of a painful right shoulder and upper extremity. Claimant gave Dr. Melhorn a history of lifting heavy objects all day at work and injuring his right shoulder and upper extremity. Claimant had undergone surgery on his right shoulder on June 29, 2009, by Dr. Do, and Dr. Do's diagnosis was a right shoulder impingement, no rotator cuff tear, labral fraying, and synovitis. Claimant told Dr. Melhorn that he elected not to return to work and that his last day worked anywhere was September 9, 2008.

In examining claimant, Dr. Melhorn found that claimant's passive range of motion for both shoulders was identical, but in active range of motion, claimant's right side was less than the left. Dr. Melhorn also reviewed x-rays of claimant's right and left shoulder and cervical spine, which were obtained in Dr. Melhorn's office. Regarding the shoulder x-rays, Dr. Melhorn stated that the bony structures were appropriate for claimant's age with no acute bone changes, and the bone pattern was appropriate for claimant's age. By evaluating the cervical spine x-rays, Dr. Melhorn was able to determine that there did not appear to be any cervical component contributing to his subjective complaints of the shoulder. Claimant had tenderness upon palpation in his shoulder, neck and scapular area. Dr. Melhorn diagnosed claimant with painful right shoulder and post right shoulder surgery. He imposed a permanent restriction that claimant limit hand over shoulder use to 10 to 15 pounds with regard to lift above chest level.

Dr. Melhorn rated claimant as having a 12 percent permanent partial impairment to the right upper extremity based on the *AMA Guides*. His rating was based on loss of range of motion, which he said incorporated pain, subjective complaints, muscle weakness and/or continued symptoms to the area. Dr. Melhorn did not find that claimant had any permanent impairment pursuant to the *AMA Guides* for the cervical or thoracic spine.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless

such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

The ALJ determined that claimant's injury and impairment were limited to claimant's shoulder and shoulder musculature. Accordingly, claimant's permanent partial disability award was limited to a scheduled injury under K.S.A. 44-510d rather than a general body

disability under K.S.A. 44-510e. Claimant contends the ALJ erred as claimant suffered injury and permanent disability to his neck and upper back in addition to his right shoulder. In support of claimant's contention is the expert medical opinion testimony given by Dr. Murati. At the time of his first examination by Dr. Murati, claimant was no longer working for respondent but had found employment working as a painter. Dr. Murati said that this activity could worsen claimant's shoulder symptoms. Ultimately Dr. Murati did not think claimant's subsequent work activities permanently worsened claimant's shoulder condition. He diagnosed claimant's neck and upper back condition as myofascial pain syndrome.

Neither the court-ordered independent medical examination physician, Dr. Melhorn, nor the treating physician who performed the surgery on claimant's shoulder, Dr. Do, diagnosed claimant with any injury or impairment beyond his shoulder. Dr. Melhorn rated claimant's shoulder impairment at 12 percent. Dr. Do's diagnosis was right shoulder impingement. The surgery consisted of a debridement with a subacromial decompression of the right shoulder. According to the records of Dr. Do that are in evidence, claimant only made complaints about and only received treatment for his right shoulder from Dr. Do. The pain diagram claimant completed for Dr. Melhorn only noted complaints in and around the right shoulder, not in the neck or back. On examination, Dr. Melhorn found claimant's neck to have full range of motion, but he did note tenderness in claimant's neck and scapular areas in addition to his shoulder. Dr. Melhorn did not consider these symptoms to require additional medical treatment or constitute a ratable condition beyond the 12 percent right shoulder rating he issued in his letter and at his deposition. The ALJ found the opinions of Dr. Melhorn to be the most credible and persuasive. The Board agrees.

CONCLUSION

As a result of his accident and injury at work with respondent on February 26, 2008, claimant has a permanent impairment to his right shoulder, a scheduled injury. Claimant's impairment of function is 12 percent to his right upper extremity at the level of the shoulder.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated May 29, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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